Supplement to
Problems and Materials on Secured Transactions
Fourth Edition

Sepinuck

December, 2019
Chapter One

Page 9, n.15:

However, a law firm is not a “debt collector” within the meaning of the Fair Debt Collection Practices Act – except with respect to one provision: § 1692f(6) – merely because the firm regularly conducts non-judicial foreclosures of real property on behalf of mortgagee clients. *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029 (2019). Moreover, a law firm hired to file a mechanic’s lien does not thereby become a “debt collector” even for this limited purpose because the firm was not hired to enforce that lien. *Jordan v. Tucker Albin and Associates, Inc.*, 2019 WL 4647339 (E.D.N.Y. 2019).

Page 19, n.36:

See also Nev. Rev. Stat. § 353C.170(2) (“From the time of its recordation, the judgment becomes a lien upon all real and personal property situated in the county that is owned by the judgment debtor, or which the debtor may afterward acquire, until the lien expires”).
Chapter Two

Page 66, second paragraph:


Page 66, n.28:

See also Figueroa Tower I, LP v. U.S. Bank, 2019 WL 1467953, at *11-12 (Cal. Ct. App. 2019) (treating the Article 9 definition of “general intangibles” as applicable to a Deed of Trust that used but did not define the term).

Page 67:

Problem 2-3a

A. Provide an example of “goods . . . furnished by a person under a contract for service,” and which therefore constitute inventory pursuant to § 9-102(a)(48)(C).
B. Why does § 9-102(a)(48)(C) include in the definition of “inventory” “goods . . . furnished by a person under a contract for service”?

Page 88, after Problem 2-12:

Problem 2-12a

Lender has a security interest in a Manet painting owned by Collector. Collector contracts to sell the painting to Buyer for $10 million. Buyer repudiates and Collector sells the painting to Substitute for $8 million, after sending reasonable notification of the sale to Buyer. Collector then brings a breach-of-contract claim against Buyer for $2 million. See U.C.C.
§ 2-706(1). Is Collector’s claim against Buyer proceeds of the painting? Why or why not?

**Page 99, Problem 2-15(B):**

The second regulation cited, 12 C.F.R. § 227.13, was apparently removed in 2016.

**Pages 99-100, n.54:**

*Compare N.H. Rev. Stat. 270:63(1)* (“A mooring permit shall not be construed as ownership of any real or personal property and shall not be transferred to any other person or location by gift, sale, lease, or rent except as provided in RSA 270:67”).

**Page 102, n.63:**

Similarly, under the Packers & Stockyards Act of 1921, 7 U.S.C. §§ 181-229, all of the livestock purchased by a packer, along with the meat or proceeds derived therefrom, might be held in trust for the benefit of all unpaid sellers of the livestock. 7 U.S.C. § 196(b). All poultry obtained by a live poultry dealer, along with the products and proceeds thereof, might be held in trust for the poultry dealer’s unpaid suppliers. 7 U.S.C. § 197(b).

**Page 106, Problem 2-28:**

*See BPM Lumber, LLC v. Begley Lumber Co., 2019 WL 3992728*, at *4 (Ky. Ct. App. 2019) (suggesting, without much analysis, that language in a security agreement purporting to encumber “[a]ll assets of Debtor including, without limitation, all accounts, receivables, intangibles, rents, profits, permits, licenses, . . . contract and lease rights, . . . whether now existing or hereafter arising, . . . and all cash or non-cash proceeds of the foregoing, including insurance proceeds,” was sufficient to cover insurance proceeds payable for damage to real property).
This point about Article 9’s rules not overriding federal restrictions on assignment is important in a variety of contexts. For example, a registered trademark symbolizes the goodwill of the business to which it relates. Because of this, the owner is permitted to transfer a registered trademark only if there is an accompanying a transfer of the associated goodwill.\(^1\) This rule applies to transfers for security, regardless of whether they purport to be absolute in form\(^2\) or structured as a security interest.\(^3\) Moreover, an attempted assignment in gross – that is, without the associated goodwill – is not only void, but might also invalidate the mark.\(^4\) Hence, pursuant to federal law, a security interest will not attach to a registered trademark unless the security agreement also purports to encumber the associated goodwill.

Potentially more significant are the federal rules relating to the assignment of rights to payment under the Medicare and Medicaid programs. Those rules require states participating in the programs to prohibit payment under the plan to anyone other than the service provider.\(^5\) Although there is authority ruling that this does not prohibit a service provider from using its right to payment under the plans as security for a loan,\(^6\) they might prevent a factoring arrangement in which the rights to payment are sold outright,\(^7\) which would otherwise be an Article 9 transaction.\(^8\)

---

4. See Clorox Co. v. Chem. Bank, 40 U.S.P.Q.2d 1098 (assignment in gross of an intent-to-use application was not only invalid but the resulting registration for such mark was also rendered void).
Page 109:

Although the draft PEB Commentary on §§ 9-406 and 9-408 indicates that those sections have little effect on ownership interests in unincorporated entities, some business lawyers remain concerned that there is insufficient protection for the “pick your partner” policy of that area of the law. Accordingly, the PEB is in the process of proposing a new § 9-406(k) and a new § 9-408(f) to make it more clear that neither section overrides a restriction on the transfer of an ownership interest in a general partnership, limited partnership, or limited liability company.

The most recent draft, dated January 18, 2018, is as follows:

§ 9-406(k) [Inapplicability to interests in certain entities.]
Subsections (d), (f), and (j) do not apply to a security interest in an ownership interest in a general partnership, limited partnership, or limited liability company.

§ 9-408(f) [Inapplicability to interests in certain entities.]
This section does not apply to a security interest in an ownership interest in a general partnership, limited partnership, or limited liability company.

Page 113, n.78:

As one court recently explained:

The intent to put the transaction in a particular legal pigeonhole – in the words of the official comment, “the subjective intention of the parties with respect to the legal characterization of their transaction” – is irrelevant. Thus, it would not matter much (if at all) if Island Leasing proved that the Debtor and it intended that the transaction would be treated as a sale for legal purposes. But the economic effects and objectives that the parties intended to achieve are relevant. “The question for the court to decide is whether the true nature of the transaction is such that the legal rights and economic consequences of the agreement bear a greater similarity to a financing transaction or to a sale.”

Pages 114-15, n.30:

See also Fla. Stat. § 559.9232(1)(e), (2)(f) (exempting rental-purchase agreements of four months or less from Article 9, even if they are automatically renewable); In re Jack, 579 B.R. 627 (Bankr. M.D. Fla. 2017) (applying that statute).

Page 124, after carryover paragraph:

Problem 2-23a

Software Developer created a popular game for use on computers and tablets. On June 1, Software Developer entered into an agreement with Buyer for Buyer to purchase all of Software Developer’s rights to the game. The agreement contains the following terms:

(i) Buyer shall pay Software Developer $20,000 on June 1 and $480,000 on December 1;
(ii) On June 1, Software Developer shall transfer a master copy of the game software to Buyer;
(iii) Software Developer “hereby” transfers all existing software licenses of the game software to Buyer, who accepts the transfer and agrees to perform all of Software Developer’s remaining duties under the licenses;
(iv) Effective December 1, Software Developer “hereby” transfers all its rights to the game software.

The agreement is silent about Buyer’s right to use or to license the software during the period between June 1 and December 1. Does the agreement create a security interest?
Chapter Three

Page 129, Problem 3-6:

At least one case suggests that a secured party can escape liability for not returning non-collateral taken in a repossession simply by including in the security agreement a clause disclaiming liability for such property. See Gill v. Board of the National Credit Union Administration, 2018 WL 5045755 (E.D.N.Y. 2018) (a credit union party had no liability for not returning the personal property of the debtor that was in his vehicle at the time the vehicle was repossessed because the security agreement expressly provided that “the Credit Union will not be responsible for any of [debtor’s] property not covered by this Agreement that you leave inside the collateral” and, in any event, the debtor failed to provide any evidence of the value of the papers, band aids, scissors, tools, nooks, tokens, radio, and vouchers that were allegedly in the vehicle). However, given the alternative rationale for the ruling – that the debtor had provided no evidence of the property’s value – it seems unwise to rely on the court’s dicta about the efficacy of such a clause.

Page 150, last paragraph:

Mississippi has a non-uniform version of § 9-623(b) that allows a debtor to redeem the collateral by tendering “[f]ulfillment of all obligations secured by the collateral then due or past due (excluding any sums that would not be due except for an acceleration provision).” Miss. Stat. 75-9-623(b)(1). Read literally, this would allow the debtor to discharge the security interest by paying current and past-due charges. It seems highly unlikely that was what the legislature intended. Such a literal interpretation would permit every debtor in an Article 9 transaction, immediately after the transaction was entered into when no amount was yet due, to redeem the collateral and thereby avoid the security interest. More likely, the

---

Note, the non uniform language apparently dates back to Mississippi’s old Article 9, see Miss. Stat. § 75-9-506 (repealed), but at least old § 9-506 applied only “after default.” There is no such limiting language in either the uniform or Mississippi version of revised Article 9.
provision was intended allow the debtor cure – not redeem – by paying current and past-due amounts. There is also some authority for the proposition that, to exercise this right, the debtor must also cure non-monetary defaults. See Bombardier Capital, Inc. v. Royer Homes of Mississippi, Inc., 2005 WL 8170128 (S.D. Miss. 2005).

Page 153, n.19:

As indicated on pages 164-65, Louisiana has a non-uniform version of Article 9 that generally does not permit the secured party to repossess collateral unless the debtor has abandoned the collateral or consented to the repossession after or in contemplation of default. However, another Louisiana statute gives specified secured parties a limited right to repossess motor vehicles, provided that can be done without a breach of the peace. La. Rev. Stat. §§ 6:966(B). For this purpose, “breach of the peace” includes: (i) unauthorized entry into a closed dwelling, whether locked or unlocked; and (ii) seizing control of the collateral following an oral protest by a debtor. La. Rev. Stat. §§ 6:955(C).

Page 162, n.26:

But see Richards v. Lawrence Towing, LLC, 2018 WL 3426260 (S.D. Ind. 2018), appeal filed, (7th Cir. Jan. 28, 2019) (because the Fair Debt Collection Practices Act is not a mechanism for matters governed by other law, the debtor had no FDCPA claim against a towing company for allegedly breaching the peace during a repossession by involving the police).

Page 162, n.28:

Some states have statutes that specify what a secured party may do or must do with personal property inside a repossessed vehicle. For example, La. Rev. Stat. § 6:966(F) provides:

If the debtor has personal property of his own or of another inside the repossessed collateral, the owner of the personal property shall have ten
days in which to contact the repossessing creditor and demand the return of his property. The secured party shall immediately return the personal effects upon request of the debtor. At the end of thirty days following the repossession of the collateral, the personal effects located inside of the repossessed collateral shall be deemed abandoned and the secured party shall no longer be responsible for such personal effects.

Page 165, n.32:

See also Iowa Code § 654.6 (requiring mediation before a secured party may enforce a debt against farm products and farming equipment).

Page 167, n.37:

See also Bremer Bank v. Matejcek, 916 N.W.2d 688 (Minn. Ct. App. 2018) (a secured party had no duty to notify a joint debtor of the sale of the collateral or to conduct the sale in a commercially reasonable manner because the secured party merely consented to the other debtor’s sale, it did not conduct the sale).

Page 168:

New York added to its version of § 9-611 a rule requiring an additional notification of a sale of an interest in a cooperative apartment. This notification must be sent at least 90 days prior to the disposition. N.Y. U.C.C. § 9-611(f). In Massachusetts, because a deficiency in a consumer credit transaction is calculated by subtracting the collateral’s fair market value – not the disposition proceeds – from the unpaid balance of the secured obligation, Mass. Gen. Laws ch 255, § 20B(e)(1), a notification of disposition in connection with such a transaction must describe the deficiency as the difference between the amount owed on the loan and the fair market value of the collateral. Williams v. American Honda Finance Corp., 98 N.E.3d 169 (Mass.), disposition following answer to certified questions, 907 F.3d 83 (2d Cir. 2018). In Nevada, a notification of intent to sell or lease a repossessed vehicle must be given at least 10 days in advance and, unless it includes
an itemization of the balance owed and the of repossession, the debtor is not liable for a deficiency. Nev. Rev. Stat. § 482.516(1), (3).

Page 168, n.41:

Mississippi requires a supplier of farming equipment to a retailer to repurchase unsold, new equipment upon termination of their contractual relationship. See Miss. Code §§ 75-77-1 through 75-77-19. The statute provides that it “shall not be construed to affect in any way any security interest which the supplier may have in the inventory of the retailer,” Miss. Code § 75-77-15, but it remains unclear if a supplier with a security interest must nevertheless comply with the repurchase obligation. See Hardi North America, Inc. v. Schindler, 2019 WL 97031 (N.D. Miss. 2019) (indicating that a supplier, which had a security interest in the equipment sold, might have a repurchase obligation but the supplier expressly denied that it was claiming rights as a secured party).

Page 179, n.49:

See Williams v. American Honda Finance Corp., 98 N.E.3d 169 (Mass. 2018) (a secured party complied with Massachusetts law – which requires that a deficiency on a car loan be calculated based on the car’s fair market value rather than the foreclosure sale price – by using the price received at a dealer’s only auction, rather than retail value).

Page 202, n.65:

See also Hamilton v. Muncy, 2017 WL 4712410 (Ky. Ct. App. 2017) (implicitly applying the absolute bar rule when ruling that a used car dealer with a security interest in a car sold to a consumer, and whose notification of disposition did not comply with § 9-614, was not entitled to a deficiency).
Chapter Four

Page 242, n.16:

See also Knoxville TVA Employees Credit Union v. Houghton, 2018 WL 3381506 (E.D. Tenn. 2018), appeal filed, (6th Cir. July 25, 2018) (dicta indicating that an error of one digit in a filed financing statement’s description of a boat’s identification number did not render the financing statement ineffective to perfect).

Page 243, n.17:

See also In re Financial Oversight and Management Board for Puerto Rico, 914 F.3d 694 (1st Cir. 2019), petition for cert. filed, (May 3, 2019) (filed financing statements that described the collateral as “[t]he pledged property described in the Security Agreement attached as Exhibit A hereto,” and which attached the security agreement, were ineffective to perfect because the attached security agreement did not define the pledged property even by type of collateral, and instead referenced a bond resolution that defined the term but which was not attached). But see In re I80 Equipment, LLC, 938 F.3d 866 (7th Cir. 2019) (a filed financing statement describing the collateral as “[a]ll Collateral described in First Amended and Restated Security Agreement dated March 9, 2015 between Debtor and Secured Party” was sufficient to perfect even though the security agreement was not also filed because the collateral was “objectively determinable” under § 9-108(b)(6)).

For a further discussion of the efficacy of a financing statement that indicates the collateral by reference to an unfiled document, see Bruce A. Markell, The Road to Perdition: I80 Equipment, Woodbridge and Liddle Pave the Way, 39 BANKR. LAW LETTER 1, 3 (Nov. 2019) (describing the I80 Equipment court’s decision as “astounding” and as “neutering” the requirement that a financing statement indicate the collateral); Muhammad S. Alkhidhr & Stephen L. Sepinuck, Circuits Disagree about Financing Statements that Indicate the Collateral Solely by Reference to Unfiled Documents, 9 THE TRANSACTIONAL LAWYER 1 (Dec. 2019).
Page 252, fourth full paragraph:

For marginal support of the point that there would be no security interest in property constituting proceeds of collateral if the property is outside the scope of Article 9, see NCC Financial, LLC v. Shilen, 2019 WL 1458606 (Conn. Super. Ct. 2019). The court ruled, without much discussion or analysis, that a secured party was not entitled to the proceeds of a life insurance policy that was purchased with the liquidated proceeds of the collateral. The court based its ruling on the fact that secured party had not alleged that the recipient of the proceeds – the debtor’s widow – was aware of the loan agreement or cited any authority that would support a cause of action if she were.

Page 253, n.24:

See also In re Wheeler, 580 B.R. 719 (Bankr. W.D. Ky. 2017) (a bank’s perfected security interest became unperfected when the bank mistakenly filed a termination statement, even though 10 minutes later the bank attempted to amend the termination by adding itself as the secured party; although the termination might have been inadvertent, it was authorized because it was filed by a loan processor of the bank that handles financing statements).

Page 260, n.35:

See also In re Coldwave Systems, LLC, 368 B.R. 91 (Bankr. D. Mass. 2007) (filing with a Patent Office did not perfect a security interest).

Page 261, end of carryover paragraph:

The rule of § 9-516(a) – communication of a record to a filing office and tender of the appropriate fee constitutes filing – also does not apply when federal law governs perfection. Instead, one must look to the applicable federal law to determine if perfection occurs when the records are presented to the appropriate office, when the office properly records the assignment of rights to the secured party, or some other time. The Ship Mortgage Act provides that an assignment
“filed in substantial compliance with this section is valid against any person from
the time it is filed with the Secretary,” 46 U.S.C. § 31321(a)(2), suggesting that rule
for perfecting interests in ships is the same as the rule in § 9-516(a). The Copyright
Act, in contrast, does not directly specify when perfection occurs.\(^\text{10}\)

\textit{Page 280 (first paragraph)}:

For the point that Article 9’s choice-of-law rules do not apply to issues about
2019) (Article 9 contains no choice-of-law rule for issues involving the attachment
of a security interest; accordingly, under general choice-of-law principles,
attachment of a security interest was governed by the law of Illinois, where the
secured party was located and the collateral was generated, not Pennsylvania where
the debtor is located).

\textit{Page 297}:

\textit{Problem 4-23a}

Trucking Company owns a fleet of commercial trucks that it leases on
a short-term basis to independent truck drivers. Lender has a security
interest in all of the trucks. Lender has not filed a financing statement but
did, with respect to each truck, comply with the applicable certificate of
title statute and had its security interest noted on the certificate for each
truck.

Yesterday, Trucking Company filed for bankruptcy protection. At that
time, Trucking Company had a deposit account at Bank with a credit

\(^{10}\) Section 205(c) of the Copyright Act does state that recordation of a document in the
Copyright Office gives all persons constructive notice of the facts stated in the recorded if,
“after the document is indexed by the Register of Copyrights, it would be revealed by a
reasonable search under the title or registration number of the work.” This suggests, but
comes a bit short of actually stating, that recording occurs before indexing. Subsection (d)
adds a relation-back rule: as between two conflicting transfers, the one executed first prevails
if it is recorded first or it is recorded within one month after its execution in the United States
or within two months after its execution outside the United States.
balance of $243,000. All of that balance is traceable to payments made to Trucking Company by independent truckers on truck leases. Lender does not have a control agreement with Bank.

What two facts do you need to know to be able to determine whether Lender has a perfected security interest in Trucking Company’s deposit account at Bank, and why are those facts important?
Chapter Five

Page 328, n.6:

See also § 9-102(a)(52)(C).

Page 331, Problem 5-1:

There is a typographical error in the problem. The reference in the seventh line to “Decompression” should be to Deep Sea Specialists, Inc.

Page 360:

Problem 5-26a

Two years ago, Bank acquired a security interest in Driller’s existing and after acquired equipment to secure a loan. Bank perfected the security interest by filing a financing statement in the appropriate office. Nine months ago, Supplier sold a large drill on credit to Driller, retaining a security interest in the drill to secure payment of the purchase price. Supplier perfected the security interest ten days after Supplier delivered the drill to Driller.

A. Last week, Driller traded the drill and a hydraulic compressor for a derrick. What are the relative priorities of Bank’s and Supplier’s security interest in the derrick?

B. How, if at all, would the analysis of Part A change if, instead of trading the drill and compressor for a derrick, Driller sold them together for a single price of $200,000, which is due in 30 days?

Page 369, Problem 5-32:

There is a typographical error in the problem. The fourteenth line indicates that the check was deposited into Delectables’ checking account at Bank One. It should have stated that the check was deposited into Delectables’ checking account at State Bank.
Chapter Six

Page 419, n.4:

The official text of § 9-334(a) states that an Article 9 security interest “may be created in goods that are fixtures or may continue on goods that become fixtures.” This language implies that whether the security agreement is entered into before or after the goods become fixtures is irrelevant. Louisiana, however, has a non-uniform version of § 9-334(a) that is substantially narrower. It provides, that an Article 9 security interest “may not be created or perfected in goods after they become fixtures,” thus indicating that sequence does matter. La. Rev. Stat. § 10:9-334. It further provides that “a security interest in goods that become fixtures continues in the fixtures if the security interest was perfected by a fixture filing when the goods become fixtures” thereby conditioning continued attachment on perfection, and indeed on perfection through a fixture filing.

Page 470, n.29:

See also § 9-302 cmt. 2 (“no agricultural lien on proceeds arises under this Article”).

Page 470, n.30:

See also Neb. Rev. Stat. § 52-1406(1)(c), (d) (indicating that an agricultural lien on crops attaches to proceeds of the crops and an agricultural lien on feed attaches to livestock that consume the feed and to products and proceeds of that livestock).

Page 470 (last full paragraph):

In some states, the information needed on a financing statement to perfect an agricultural lien is more extensive than what is needed to perfect a security interest. See, e.g., Neb. Rev. Stat. §§ 52-1402(2), 52-1407(1); In re Hill, 2018 WL 1916172 (Bankr. D. Neb. 2018) (because the financing statement filed by the party with an
agricultural lien on crops lacked the dates of the transactions giving rise to the lien, a signature of the person to whom the pesticides and fertilizer were furnished, and the lienholder’s tax identification number, the agricultural lien was unperfected).

**Page 479 (first paragraph):**

In the following sixteen states, a notice of federal tax lien is filed in an office other than the office in which UCC financing statements are filed:

<table>
<thead>
<tr>
<th>Alaska</th>
<th>Ohio</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indiana</td>
<td>Pennsylvania</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Rhode Island</td>
</tr>
<tr>
<td>Maryland</td>
<td>South Carolina</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Tennessee</td>
</tr>
<tr>
<td>Missouri</td>
<td>Utah</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Vermont</td>
</tr>
<tr>
<td>New Mexico</td>
<td>West Virginia</td>
</tr>
</tbody>
</table>

In the following three additional states, notices of federal tax lien and UCC financing statements are filed in the same office but are, apparently, not indexed together, so that a separate search of each database is necessary:

Florida
Georgia
Illinois